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October 27, 2008

VIA ECFS

Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *High-Cost Universal Service Support; Federal-State Joint Board on
Universal Service, WC Docket No. 05-337, CC Docket No. 96-45*

Dear Chairman Martin and Commissioners Copps, Adelstein, Tate and McDowell:

With our country facing recession and the gravest financial crisis since the Great Depression, the rush by the Commission to adopt radical reform of the universal service system on November 4 is unwise and contrary to recent government measures undertaken to preserve capital markets and stimulate economic growth. The details of the proposed reform are not available to the public, and they were first made available to the Commissioners less than two weeks ago. Forced to rely solely upon rumors and press reports, the public has filed hundreds of pages of *ex parte* statements over the past two weeks to express serious concern about the rumored reform, which is profoundly different than the general reform proposals upon which the Commission requested comment years ago. Three weeks is not enough time for the Commissioners to review and fully consider the proposed order itself, let alone the flurry of filings parties have submitted based on rumors and press releases about the contents of the order.

No deadline or threat to the fund compels immediate action before the public can comment on specific reform proposals. Under these circumstances, rushing ahead with radical reform would be ill-advised and fundamentally inconsistent with the manner in which our government is supposed to serve the public interest. The public interest mandates that the actions of an executive agency be open to meaningful input from the public, particularly on the eve of a presidential election.

Chairman Martin
October 27, 2008
Page Two

Failure to publish the details of the proposed reform and provide the public with a meaningful opportunity to comment on those details will create uncertainty in the communications and technology sector of the United States economy. Specifically, adopting radical reform without public feedback exponentially increases the likelihood that universal service reform will be tied up in litigation for years, as the tenor and content of many of the recent filings demonstrate. Uncertainty in a market sector that is as capital intensive as the communications and technology sector will materially harm the public interest, slow the deployment of broadband and narrowband networks and services, and potentially cost American jobs. By contrast, making the reform process more transparent and incorporating public feedback into the proposed reforms would increase certainty.

The rumored details of the proposed reform are as disturbing as the lack of transparency. A vote for the rumored order would be a vote against consumers, rural America and broadband deployment, which no rhetorical flourishes in the order itself or in any separate statement will be able to disguise. Broadband in name only, the proposed order would discourage carrier participation in the universal service program, thereby delaying the deployment not only of wireless broadband services, but of all types of wireless services in rural and high-cost areas. Indeed, the clear purpose of the proposals under Commission consideration is to reduce competitive eligible telecommunications carrier ("ETC") participation in the universal service programs, with a particular emphasis on discouraging wireless carriers from participation. The proposed order is very likely to decrease wireless investment in rural America by over \$1 billion during 2009, which would harm the American economy during this already precarious time. The proposed reform also fails to account for the critical public safety benefits of mobile wireless service and rural infrastructure development. In today's world, mobile telephones serve as a critical public safety tool, but only in areas where wireless networks are deployed.

The rumored reform is also completely unmoored from the statutory foundations of the universal service program. The 1996 Act "codified the historical commitment of the Commission and state regulators to promot[ing] universal service by ensuring that consumers in all regions of the nation have access to affordable, quality telecommunications services."¹ The touchstone for the universal service program is the principle of "reasonable comparability" set

¹ *Federal-State Joint Board on Universal Service; High-Cost Universal Service Support*, Notice of Proposed Rulemaking, 20 FCC Rcd 19731, 19732, ¶ 2 (2005). As such, a major objective of the universal service provisions of the Act is to ensure the existence of affordable access to telecommunications services for consumers living in areas where the costs of services would otherwise be prohibitively high. *Federal-State Joint Board on Universal Service*, NPRM & Order, 17 FCC Rcd 2999, 3001, ¶ 3 (2002).

Chairman Martin
October 27, 2008
Page Three

forth in section 254(b)(3).² The goal for the universal service distribution mechanism therefore is to ensure that the choices available to consumers in rural and high-cost regions of the United States are “reasonably comparable” to those available in urban areas with respect to service type, service providers and service rates. In order to achieve this goal, support must be made available on a technologically and competitively neutral basis in any rural or high cost area where consumers do not have reasonably comparable access to any one of the factors. Where support is necessary, section 254(b)(5) of the Act mandates that it be specific, predictable and sufficient. However, the radical reforms the Commission is considering have nothing to do with comparing the availability of services, service providers and service rates between urban and rural or high cost areas. The proposed reforms will *reduce* service options and limit the expansion of broadband in rural and high-cost areas.

For these reasons, the Universal Service for America Coalition (“USA Coalition” or “Coalition”),³ by its attorneys, urges the Commission to publish the details of the proposed reform so that the public can provide meaningful feedback. In any event, the Commission should reject the proposed radical reforms in the pending draft as contrary to the provisions of the Act and against the public interest.⁴

² 47 U.S.C. § 254(b)(3). The Commission has found that “section 254(b)(3) reflects a legislative judgment that all Americans, regardless of income, should have access to the network at reasonably comparable rates.” *Federal State Joint Board on Universal Service; High-Cost Universal Service Support*, Notice Of Proposed Rulemaking, 20 FCC Rcd 19731, 19736-37, ¶ 10 (2005).

³ The USA Coalition consists of eight of the nation’s leading rural providers of wireless services, and is dedicated to advancing regulatory policies that will enable Americans to enjoy the full promise and potential of wireless communications, regardless of where they live and work. The members of the USA Coalition include Carolina West Wireless, MTPCS, LLC d/b/a Cellular One, Cellular South, Corr Wireless Communications, Mobi PCS, SouthernLINC Wireless, Thumb Cellular LLC and US Cellular.

⁴ For the sake of brevity, the USA Coalition incorporates the comments it has made in previous filings. Letter from Todd Daubert, USA Coalition, to Chairman Martin, FCC, *Federal State Joint Board on Universal Service; High-Cost Universal Service Support*, WC Docket No. 05-377, CC Docket No. 96-45 (filed Sep. 30, 2008) (*USA Coalition Letter*); Reply Comments of the USA Coalition, *Petition of AT&T for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the “ESP Exemption,”* WC Docket No. 08-152 (filed Sep. 2, 2008).

Chairman Martin
October 27, 2008
Page Four

No Deadline Mandates Reform Without Transparency and Public Participation

The Commission is under no deadline to adopt universal service reform by November 4. Under the Act, the deadline for Commission action on the Joint Board Recommendations is November 21.⁵ However, the USA Coalition supports the Motion for Public Comment on Universal Service and Intercarrier Compensation Reform put forth by the National Association of Regulatory Utility Commissioners (“NARUC”).⁶ The extension will allow these state Joint Board members (as well as the others) the opportunity to “participate in the [Commission’s] deliberations” as required by section 410(c) of the Act.⁷ Moreover, as noted by NARUC, three of the four state commission Joint Board members have asked for this extension by signing onto NARUC’s Motion, and the National Association of State Utility Consumer Advocates, which nominates the fifth State member to the Joint Board, has already filed in support of NARUC’s Motion.⁸ To the extent the Commission has any doubt about its authority to grant the NARUC Motion, the Commission could reject the current recommendation and, to the extent necessary, request preparation of a Joint Board recommendation on the specific reform measures the Commission currently is considering.

The Proposal Would Inhibit Deployment of All Wireless Services, including Broadband

According to the latest rumors and press reports, the radical reform being considered by the Commission includes the following features:

⁵ 47 U.S.C. § 254(a)(2) (requiring the Commission to “complete” proceedings on Joint Board Recommendations with one year of receipt).

⁶ NARUC Motion for Public Comment, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the ESP Exemption*, CC Docket No. 08-152, *IP-Enabled Services*, WC Docket No. 04-36, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Petition for Declaratory Ruling Filed by CTIA*, WT Docket No. 05-194, *Jurisdictional Separations & Referral to the Federal-State Joint Board*, CC Docket No. 80-286 (filed Oct. 21, 2008).

⁷ *Id.*

⁸ NARUC Ex Parte Letter, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the ESP Exemption*, CC Docket No. 08-152, *IP-Enabled Services*, WC Docket No. 04-36, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Petition for Declaratory Ruling Filed by CTIA*, WT Docket No. 05-194, *Jurisdictional Separations & Referral to the Federal-State Joint Board*, CC Docket No. 80-286 (filed Oct. 24, 2008).

Chairman Martin
October 27, 2008
Page Five

- Support for each competitive ETC is capped at the end of the year 2008 level, as established by the current distribution mechanisms;
- Each competitive ETC must make a commitment to provide 100 percent broadband access within five years, benchmarked at serving 20 percent of the unserved households in the study area per years (20%, 40%, 60%, 80% and then 100%) or lose all support;
- Each competitive ETC must make a detailed cost showing and calculate its per-line costs by dividing its costs – *excluding spectrum costs* – by the incumbent ETC's line count rather than the competitive ETC's own line count. If the line cost does not exceed the wireline benchmark, the competitive ETC will lose all support;
- If the incumbent ETC is unable to satisfy the two-way broadband commitment, the Commission will conduct a reverse auction with the current level of support as the reserve price and two-way broadband as a bidding condition; and
- If nobody bids in the reverse auction, the incumbent would not have to fulfill the broadband requirement. By contrast, if a competitive ETC wins, it would have to satisfy all of the carrier of last resort requirements and the broadband requirement.

These requirements are fundamentally inconsistent with the Act because they are not technologically or competitively neutral, and they are not designed to meet the goals of the Act. The transparent goal of this proposal *is not* to increase the availability of broadband in high-cost and rural areas. Rather, the clear objective of the proposal is to reduce the number of ETCs participating in the universal service program by imposing conditions so onerous that participation becomes untenable for carriers.

Broadband Requirement

There is no shortage of incentives for carriers to provide broadband services in rural and high-cost areas if they profitably can do so. However, the proposed requirement that a reverse auction be conducted in areas where no existing ETCs are able to meet the broadband requirement is just a ruse to relieve the incumbent ETC of the broadband requirement because new entrants are far less likely to be capable of meeting the broadband requirement on even less support than is necessary for existing ETCs to do so. Moreover, a blanket requirement that competitive ETCs provide broadband services in all areas at today's funding levels – which were determined by the current distribution mechanism – would be an illogical unfunded mandate

Chairman Martin
October 27, 2008
Page Six

which violates the requirement that funding be “sufficient” to achieve the goals of universal service.”⁹

This unfunded broadband mandate would have the effect of discouraging not only the deployment of broadband wireless services and facilities but also non-broadband wireless services. Carriers who might have found the provision of broadband to be profitable at some future time (*e.g.*, once basic facilities were in place) may choose to focus solely on areas that cost less to serve. Additionally, the broadband requirement may actually cause carriers to withdraw non-broadband facilities from areas where service currently is provided through USF support, as that support will no longer be available to them if they cannot provide broadband in that area. The phase-in provides no relief as most, if not all, carriers would have to fully upgrade their networks in the first year just to meet the 20% requirements because of the manner in which wireless services are provided. Not only are the requirements illogical on their face, but they have no relationship to the statutory universal service goals since they are not based upon an examination of whether services are reasonably comparable in any given area. The Commission instead should be facilitating the deployment of all types of wireless services, including broadband. For example, including wireless broadband as a supported service, rather than imposing a broadband mandate, would speed the deployment of broadband services.

A decision by the Commission to facilitate wireline broadband at the expense of wireless broadband would not only violate the requirement that universal service be technologically and competitively neutral, but it would also be fundamentally inconsistent with the public interest. In one recent survey by IBM, over 50 percent of consumers stated that they would substitute their Internet usage on a PC for a mobile device.¹⁰ In the United States, approximately 78 percent of adults have a mobile phone, making it the perfect source for widespread adoption of the wireless internet.¹¹ Indeed, in the IBM survey, thirty-nine percent of respondents stated that they expect to increase internet use on their mobile device by at least forty percent over the next three years.¹² The most sought after features by consumers included high speed data transfers and

⁹ 47 U.S.C. § 254(e).

¹⁰ IBM Study Find Consumers Prefer a Mobile Device Over the PC, CELLULAR-NEWS.COM (Oct. 22, 2008) *available at* <http://www.cellular-news.com/story/34273.php?source=rss> (surveying 600 consumers in the USA, China and the UK) (*IBM Mobile Study*).

¹¹ Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2007*, Division of Health Interview Statistics, National Center for Health Statistics (rel. May 13, 2008).

¹² *See IBM Mobile Study.*

Chairman Martin
October 27, 2008
Page Seven

better content and applications for the mobile internet.¹³ These responses clearly indicate that consumers want and expect wireless broadband services to expand over the next few years. Rather than attempting to play catch up by supporting only traditional wireline broadband technology at the expense of wireless, the Commission should look to the future by equally supporting mobile broadband wireless service through USF funding.

Cost Showing Requirement

The proposed reform would deny funding to competitive ETCs unless they meet an impossibly high cost benchmark that serves no purpose other than to make participation in the universal service program virtually impossible for many wireless competitive ETCs. In order to qualify for support the order reportedly provides, a competitive ETC's costs must be high enough that, when divided by the **incumbent ETC's line count**, the pseudo-"cost-per-line" exceeds the wireline benchmark for the area or is more than two standard deviations from the national average cost-per-line. Furthermore, the proposed reform would exclude spectrum costs and certain other ordinary costs of deploying rural wireless from cost calculations for wireless carriers, practically ensuring that no wireless carrier qualifies for support. This proposed metric is fundamentally inconsistent with the Act and must be rejected.

As an initial matter, wireless carriers must be allowed to include spectrum costs and other ordinary deployment and operation costs in their cost reports in order to avoid running afoul of the principle of competitive neutrality.¹⁴ Spectrum is a major cost for all wireless carriers, and it is the physical and logical equivalent of wireline plant for traditional wireline carriers. Put simply, spectrum is to wireless carriers what copper and fiber are for wireline carriers. No rational justification exists for the exclusion of these costs, when the analogous costs for wireline carriers are included in carrier cost reports as a matter of course. Any outcome other than the inclusion of spectrum is in clear violation of the pro-competitive spirit of the Act and the principle of competitive neutrality requiring that "universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."¹⁵ As such, the exclusion of spectrum costs is fundamentally inconsistent with the Act. The only purpose for such a requirement is to keep wireless carriers from participating in the program.

¹³ *Id.*

¹⁴ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8801, ¶ 47 (1997).

¹⁵ *Id.*

Chairman Martin
October 27, 2008
Page Eight

The requirement that wireless ETCs divide their costs by the incumbent wireline's line count rather than their own is similarly unjustifiable. If a wireless ETC has yet to enter a market or needs support to expand its network, it likely will have lower line counts than the incumbent LEC, and thus this requirement would have the effect of underestimating a competitive ETC's costs for no justifiable reason. To the extent the Commission is eliminating the identical support rule, there is no justification for maintaining an arbitrary connection to incumbent ETCs costs. The requirement cannot be squared with the Act's goal of ensuring that consumers in rural, insular and high cost areas have access to services that are reasonably comparable to those available in urban areas.¹⁶

The Proposed Permanent Funding Cap Is Fundamentally Inconsistent with the Act

One of the most troubling aspects of the proposal is the permanent funding cap, which cannot be squared with the Act. When the Commission imposed the interim cap, the agency claimed that it was a temporary measure that would be in place only until permanent reform could be adopted.¹⁷ The skepticism of the competitive ETCs was justified because the Commission now is on the verge of imposing a permanent cap that is fundamentally inconsistent with the Act.

The imposition of a permanent cap represents an admission that the Commission has failed at adopting true reform. Indeed, if the Commission were reforming the system to conform with the requirements of the Act, a cap should be unnecessary. Furthermore, the Commission has claimed repeatedly that the current distribution mechanism is fundamentally flawed, and thus it makes no sense to lock in permanently support levels that were set by this allegedly "flawed" system. This is particularly true to the extent that the Commission engages in intercarrier

¹⁶ As the USA Coalition has explained in past filings, if the primary purpose for imposing a cost study requirement is to identify costs eligible for recovery, then the FCC must permit full recovery of those costs in accordance with the statutory mandate that support be specific, predictable and sufficient. *USA Coalition Letter* at 8-11. Otherwise, it is simply imposing a cost-reporting burden upon competitive carriers for no reason. If the primary purpose instead is to prevent over-recovery, there are much less burdensome means for doing so.

¹⁷ At the time of the interim cap's adoption, the Commission stated that it "will remain in place only until the Commission adopts comprehensive, high-cost universal service reform." Rather than accomplishing this, however, the Commission has simply locked the "interim cap" in place permanently. *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, FCC 08-122, ¶ 22-23 (rel. May 1, 2008) (*Interim Cap Order*).

Chairman Martin
October 27, 2008
Page Nine

compensation reform, which cannot help but impact both the amount of support that is necessary to achieve the Act's goals as well as the geographic locations where support should be provided.

Any type of cap is at odds with the terms of the Telecommunications Act of 1996, which promised to "preserve *and advance*" universal service.¹⁸ Simply put, universal service cannot be "advanced" by providing less support to carriers serving rural and high-cost areas, or by denying universal service support to competitive ETCs. To the extent the Commission wishes to support broadband expansion, more funding, not less, is required.

The proposed cap would not only interfere with efforts to preserve and advance universal service, but it also locks current flaws into the system permanently.¹⁹ Today, there are certain geographic areas that receive too much support, and there are other areas that receive insufficient support. Permanent imposition of the proposed cap would leave these imbalances in place indefinitely. Although predictable, such support is insufficient because some areas would, by definition, not be eligible to receive funding no matter how great the need becomes. Such limitations also raise public safety issues, as denying wireless carriers the ability to receive funding in some areas would interfere with the public's access to emergency services.²⁰

¹⁸ 47 U.S.C. § 254(b)(5) (emphasis added); *see also* Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (explaining that the purpose of the 1996 Act is "to encourage the rapid deployment of new telecommunications technologies");

¹⁹ The interim cap was only adopted because the commission found that then-current rate of growth "could cripple the universal service fund." *Interim Cap Order* ¶ 22-23.

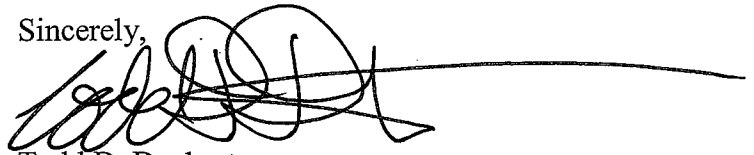
²⁰ The Commission reports that approximately 50% of 911-Emergency calls are placed from wireless phones. *Wireless 911 Services: FCC Consumer Facts*, Consumer & Governmental Affairs Bureau, FCC available at <http://www.fcc.gov/cgb/consumerfacts/wireless911srv.html>.

Chairman Martin
October 27, 2008
Page Ten

Conclusion

For the reasons set forth in this letter, the USA Coalition urges the Commission to reject any proposed reform of the universal service fund at this time pending further notice and comment.

Sincerely,

A handwritten signature in black ink, appearing to be "Todd D. Daubert", with a long horizontal line extending to the right.

Todd D. Daubert

Counsel for the USA Coalition